COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Proceeding by the Department of Telecommunications and Energy on its own Motion to Implement the Requirements of the Federal Communications Commission's Triennial Review Order Regarding Switching for Mass Market Customers	D.T.E. 03-60

AT&T'S OPPOSITION TO VERIZON'S MOTION TO STAY TRACK A

AT&T Communications of New England, Inc., ("AT&T") respectfully urges the Department to deny Verizon's motion to stay Track A, and instead to continue with its investigation of the facts which demonstrate that CLECs have been and are unable to compete in the local exchange mass market in Massachusetts without access to unbundled switching and UNE-P at TELRIC-compliant prices.

Verizon suggests that the Department would be "feckless" if it continued these proceedings.[1] But Verizon has it backwards. It is Verizon that asks the Department to be irresponsible, by ignoring deadlines in the FCC's *Triennial Review Order* that remain in place, and by ignoring the continuing importance of completing the fact finding that is at the core of the Track A proceedings in this docket.

Verizon has a strong interest in diverting attention away from the facts showing that CLEC mass market entry is impaired without UNE-P. From Verizon's perspective, continuation of the investigation in Track A is inconsistent with Verizon's desire to divorce public policy

[1] Verizon's Motion to Stay at 2.

determinations in this area from the facts. But that is not a reason to stay or terminate this investigation.

The simple truth is that the recent *USTA II* decision by the United States Court of Appeals for the District of Columbia Circuit has not taken effect, and is quite likely to be stayed for a long period of time. By its terms it will not take effect until at least 60 days after issuance, and perhaps for much longer. As Verizon concedes, the Court stayed the effect of its decision until the *later* of: (i) denial of any petition for rehearing or rehearing on banc; or (ii) 60 days from March 2, 2004. Furthermore, there is a strong likelihood that during this period the D.C. Circuit's decision may be stayed pending review by the United States Supreme Court. The majority of FCC commissioners who voted in favor of the *TRO* already have announced their intention to seek both a stay and Supreme Court review of the DC Circuit decision.[2] AT&T and a number of other parties, including NARUC, wholeheartedly support the FCC majority's actions. AT&T is highly optimistic that the Supreme Court, which issued a very strong opinion in May 2002 in support of competition,[3] will accept this case and affirm the FCC's findings and rules as well as the right of the states to implement rules critical to support telecommunications competition, especially (but not exclusively) for mass market consumers. AT&T is equally optimistic that the DC Circuit's decision will be stayed, in no small part because of the marketplace confusion and consumer harm that Verizon and other ILECs would likely attempt to create if the decision were allowed to become effective before the Supreme Court has the opportunity to review it.

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[2] "Statement of FCC Commissioners Michael J. Copps, Kevin J. Martin, and Jonathan S. Aderstein on the D.C. Circuit's Decision to Eliminate the FCC's Rules," dated March 3, 2004 (attached).

[3] *Verizon Communications, Inc. v. FCC*, 535 U.S. 467 (2002).

NARUC's President has urged the FCC to "immediately seek certiorari of this decision," and has indicated that NARUC itself "expects to seek review of this decision."[4] The Michigan PSC has agreed, issuing a statement "in support of the majority of the Federal Communications Commission's (FCC) decision to instruct their General Counsel to seek a stay and to appeal to the Supreme Court a recent D.C. Circuit decision," and indicating that the Michigan PSC intends to work with NARUC on an appeal of the Court's ruling.[5] Similarly, the President of the National Association of State Utility Consumer Advocates (NASUCA) noted that "[t]he Court's decision … puts at risk the meager competitive gains in local telephone service seen by residential and small business consumers in the last two years," and "strongly urge[d] the FCC to appeal the Circuit Court decision to the United States Supreme Court for a final word on these crucial issues."[6]

AT&T respectfully urges the Department to join with NARUC, NASUCA, and other state public utility commissions both in urging the FCC to seek further review and a stay of the misguided *USTA II* decision by the D.C. Circuit, and in supporting and working with NARUC and the FCC on such an appeal.

Verizon's motion cannot explain away the simple fact that at this time the FCC's *Triennial Review Order* remains in effect and the rules and deadlines imposed by the FCC for completing the Department's nine-month proceeding remain in place. If this proceeding were stayed for any substantial period of time, the Department could find itself backed into a position where it could no longer comply with its current obligations under the *TRO*.

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4 NARUC Press Release issued March 3, 2004 (attached).

5 Michigan PSC Press Release dated March 3, 2004 (attached).

6 NASUCA Press Release dated March 3, 2004 (attached).

But even if the D.C. Circuit decision were to survive these expected challenges, it remains critical that the Department move forward with the state-specific investigatory and fact-finding role that was inherent in the *TRO* process. It is important to note that the Court did not make any finding of non-impairment, nor did it direct the FCC to make any such finding. Hence, the Court's order would not in any way end Verizon's existing obligations to provide unbundled mass market switching and UNE-P. Rather, the decision (if it were ever to take effect) would remand the matter to the FCC "for a re-examination of the issue." Decision at 22.

Even if, at the end of the day, the FCC is compelled to re-analyze the impairment issue under the Telecommunications Act (as distinguished from the independent power and responsibility of state commissions to make their own unbundling and other policy decisions as a matter of state law), it will need to base any further findings on granular, market-specific factual findings. For this reason, state commissions that gather the relevant facts within their jurisdictions will be able to provide important input to and thereby influence the FCC's ultimate findings. But they will be able to play this critical role if and only if they have the information on market conditions within their jurisdictions. Conversely, states that fail to move forward and develop an evidentiary record which they can share with the FCC will be rendered mute, and irrelevant to any such FCC review. Verizon's motion to stay is essentially a request that the Department marginalize itself with respect to any future unbundling decisions by the FCC with respect to Massachusetts.

The DC Circuit's decision expressly recognizes that states have invaluable – and clearly lawful – input into the unbundling decisions, both in fact gathering and providing advice on how they affect critical decisions involving local competition. Specifically, the Court held that "a federal agency may turn to an outside entity for advice and policy recommendations, provided

the agency make the final decision itself." Decision at 17. This has already prompted the chair of the New York Commission to announce that because his commission and the parties have "already made significant progress in developing the underlying factual record that will be needed . . ." the New York Commission will "continue to be actively engaged in gathering relevant data and factual information . . ."[7] Similarly, Commissioner Robert Nelson of the Michigan PSC, and the Chair of the NARUC Telecommunications Committee, has noted the importance of state-specific factual determinations by state commissions if only to "assist the FCC in the determinations they will have to make pursuant to" the recent D.C. Circuit decision.[8]

Regardless who makes the next round of decisions concerning impairment, the states are best positioned to gather the critical facts. For this reason, continuing forward with Track A of this proceeding, in order to permit testing – through cross-examination and argument – of the written evidence which has already been filed by the parties, will help ensure an outcome that reflects the facts on the ground in Massachusetts, and thus best serves the interests of Massachusetts consumers. No other agency can develop the facts which demonstrate the severe limits on the ability of CLECs to enter and serve the mass market in Massachusetts without access to unbundled switching and UNE-P as effectively as the Department. The Department will never be better positioned to create a full and complete record than it is right now.

Verizon tries to argue that the Department cannot continue forward because the D.C. Circuit decision purportedly "invalidates … the substantive tests that the FCC promulgated" for determining "whether CLECs are impaired without access to unbundled elements."[9] Verizon's

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7 Statement from NY PSC Chairman William M. Flynn, March 3, 2004 (attached).

8 Quoted in NARUC Press Release issued March 3, 2004 (attached).

9 Verizon's Motion to Stay at 1.

claim that the Court struck down the FCC's interpretation of the statutory impairment standard, which continues to require Verizon to provide unbundled elements wherever CLECs would be impaired without them, is dead wrong. To the contrary, the Court spoke quite favorably about the FCC's findings that the impairment standard tests whether CLEC market entry would be impaired without access to an unbundled network element, and thus that the impairment standard requires consideration of barriers to entry such as sunk costs, ILEC absolute cost advantages, first-mover advantages, and operational barriers to entry within the sole or primary control of the ILEC. Decision at 23. The only criticism made by the Court regarding the FCC's definition of the impairment standard was based on a mistaken reading of the *TRO*. The Court was concerned that the FCC's impairment definition would be unduly vague unless the question of whether future CLEC market entry would be uneconomic without access to an unbundled network element was clearly defined to specify the kind of CLEC to be considered in answering this question. Decision at 24-25. But in fact the FCC provided this specificity. In the *TRO*, the FCC stressed that neither carrier-specific nor business plan-specific approaches would be appropriate in determining whether future market entry by CLECs would be impaired without access to a particular unbundled element.[10] Rather, an analysis of whether such entry would be economic "must be based on the most efficient business model for entry rather than to any particular carrier's business model."[11] Thus, a finding of non-impairment with respect to a particular UNE would only be appropriate if there is evidence sufficient to demonstrate that an efficient CLEC would most likely find it economic to enter the market without access to that UNE, given the range of likely costs, revenue opportunities, and competitive risks (*i.e.*, "the cost and risk of

[10] *TRO* ¶ 115.

[11] *TRO* ¶ 517.

failure").[12] In sum, we know what the impairment standard measures, with more than enough specificity for the Department to be able to continue its factual investigation in Track A.

The Department has requested that the parties specifically address both the jurisdictional basis for going forward with this proceeding, and the procedural schedule for doing so.

With respect to jurisdiction, as discussed above the Department continues to have full delegation of authority from the FCC under the *TRO*. If, hypothetically, the D.C. Circuit's recent decision were to take effect and relevant portions of the *TRO* were as a result vacated, then the Department would have jurisdiction to proceed both under federal law and under Massachusetts law. The federal Telecommunications Act requires Verizon to provide access to unbundled network elements wherever CLECs would be impaired without them, and the Department retains power to enforce that requirement of federal law.[13] In addition, the Department has broad powers under Massachusetts law to regulate Verizon's network and wholesale services and has long recognized its authority under state law to require Verizon to provide access to unbundled network elements.[14] For the purpose of evaluating Verizon's pending motion to stay, nothing in the Department's recent ruling in D.T.E. 98-57 Phase III, or in any other docket, affects the Department's long established determination of its jurisdiction over the unbundling of local services. In Docket 98-57 Phase III, the Department recently concluded that it lacks the power to address obligations to unbundle particular network elements under Massachusetts law where the FCC has made findings regarding obligations to unbundle the same elements under federal law.

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[12] *TRO* ¶¶ 77, 517.

[13] *See*, 47 U.S.C. § 251 (imposing a duty on Verizon to provide access and interconnection) and 47 U.S.C. § 252 (conferring jurisdiction on state commissions to determine rates, terms and conditions of such access and interconnection).

[14] *See* D.P.U. 94-185, *Vote to Open Investigation* at 3-5 (Jan. 6, 1995).

As the Department is aware, AT&T respectfully believes that the Department reads the scope of its continuing authority under Massachusetts law too narrowly, and for that reason AT&T has appealed from this ruling. But for present purposes, that issue need not be revisited. If the *TRO* were to be vacated and if the result were to be that we were left without any FCC guidance regarding the scope of Verizon's unbundling obligations under federal law, then the preemption concerns addressed by the Department in its 98-57 Phase III ruling would not arise and it would be clear that the Department would have the power and obligation under both federal and state law to address Verizon's unbundling obligations in Massachusetts. Conversely, if the *TRO* remains in effect indefinitely, as seems quite likely, then the FCC's delegation to the Department would remain in effect. Either way, the Department has sufficient power and jurisdiction to continue with this proceeding.

With respect to procedural schedule, it would be appropriate for the Department to conclude its fact finding as soon as possible, and to be in a position to comply with the *TRO* under the current nine-month deadline.

For all of these reasons, AT&T opposes Verizon's motion to stay the proceedings in Track A of this docket. Under any likely scenario, the Department will be asked, at a minimum, to provide facts and counsel on whether competition has (or can) develop in Massachusetts in the absence of key unbundled network elements. Before it can respond, and before it can act, the Department will need to make findings regarding the factual evidence that has already been presented in the parties' prefiled testimony.

AT&T agrees with Verizon that the Department should also move forward on Track B of this proceeding, related to hot cuts. The lack of economically viable, efficient, and scalable hot cut processes in Massachusetts continue to pose a serious barrier to the expansion of UNE-L

based competition in Massachusetts beyond its currently narrow confines. Solving these problems is the work of Track B.

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